DATUK IR CHE AMRAN MOHD YUSOFF *a*

v.

YAYASAN MELAKA & ORS

HIGH COURT MALAYA, MELAKA *b*
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-431-2001]
7 JANUARY 2003

CIVIL PROCEDURE: *Pleadings - Striking out writ and statement of claim, application for - Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d) - Whether limbs (b), (c) and (d) of O. 18 r. 19(1) were used disjunctively - Whether use of word "or" proper* *c*

CIVIL PROCEDURE: *Pleadings - Striking out writ and statement of claim - Principles applicable - Whether only in absolutely plain and obvious cases - Whether weakness or demerits of a plaintiff's claim a ground for striking it out - Whether plaintiff's claim scandalous, frivolous or vexatious - Whether claim might prejudice, embarrass or delay fair trial of action - Whether claim an abuse of process of court - Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d) - Whether plaintiff had locus standi to commence derivative action* *d* *e*

CIVIL PROCEDURE: *Locus standi - Derivative action - Whether plaintiff had locus standi to initiate derivative action as minority shareholder - Plaintiff a director and 40% shareholder in defendant company - Allegation of wrongful acts being committed by majority shareholder amounting to fraud on the minority - Whether plaintiff's derivative action came within exceptions to rule in Foss v. Harbottle - Ultra vires acts - Fraud on the minority - Whether plaintiff's action could be struck out under O. 18 r. 19(1) Rules of the High Court 1980* *f*

COMPANY LAW: *Derivative action - Fraud on the minority - Ultra vires acts - Plaintiff a director and 40% minority shareholder in defendant company - Allegation of wrongful acts being committed by majority shareholder amounting to fraud on the minority - Whether plaintiff's derivative action came within exceptions to rule in Foss v. Harbottle - Whether plaintiff had locus standi to commence derivative action - Whether plaintiff's action could be struck out under O. 18 r. 19(1) Rules of the High Court 1980* *g* *h*

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This was an application by the 1st and 2nd defendants under O. 18 r. 19(1)(b), (c) or (d) of the Rules of the High Court 1980 ('RHC') to strike out the plaintiff's writ and statement of claim or, alternatively, part thereof. At the outset of the hearing, the plaintiff raised the procedural objection that the defendants' collective use of limbs (b), (c) or (d) of O. 18 r. 19(1) of the RHC was improper.

On the merits of the application, the defendants contended, primarily, that the plaintiff lacked the *locus standi*, based upon the rule in *Foss v. Harbottle*, to bring the action against the 1st and 2nd defendants. In reply, the plaintiff submitted that its action, which was commenced by way of an originating summons, had been amended to include the plaintiff's representative capacity, and that the originating summons had subsequently been converted to a writ which was based on a derivative action by the plaintiff as a minority shareholder in the interest and for the benefit of the 3rd defendant company.

Held:

[1] The defendants' use of the word "or" in respect of their application under O. 18 r. 19(1)(b), (c) or (d) of the RHC showed that the three said limbs of O. 18 r. 19(1) were being used 'disjunctively'. This was clearly distinguishable from the case of *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [2001] 3 CLJ 743 HC in which the 'cumulative' phrase "and/or" was used with regard to limbs (b), (c) and (d) of O. 18 r. 19(1) of the RHC. The plaintiff's procedural objection herein was, therefore, unsustainable. (p 771 b-c & f-g)

[2] The plaintiff's derivative action was founded upon his 40% shareholding in the 3rd defendant company as well as his position as a director and the executive deputy chairman of the said company. The derivative action was also based upon the plaintiff's allegation that numerous wrongful acts had been committed by the 1st defendant as the majority shareholder which amounted to a fraud on the minority. All these allegations of fact were sufficient to bring the plaintiff's action within the boundaries of two of the exceptions to the rule in *Foss v. Harbottle*, *viz*, *ultra vires* acts and fraud on the minority. Consequently, the plaintiff had the *locus standi* to initiate the derivative action as a minority shareholder. (pp 773 f-h & 774 a-b, f)

[3] The derivative action was not 'scandalous' in the sense that it was 'wholly unnecessary or irrelevant'. It was initiated by the plaintiff as a director and a 40% shareholder in the 3rd defendant company. The action was also not 'frivolous' or 'vexatious' in the sense that it was

'obviously unsustainable'; hence, it could not be struck out under O. 18 r. 19(1)(b) of the RHC. The plaintiff's claim would also not prejudice, embarrass or delay the fair trial of the action within the meaning of O. 18 r. 19(1)(c) of the RHC, nor would it amount to an abuse of the process of the court within the meaning of O. 18 r. 19(1)(d) of the RHC. (pp 774 h & 775 a-e)

[4] It is only in absolutely plain and obvious cases that a plaintiff's claim or action or a party's pleadings would be struck out under any of the limbs of O. 18 r. 19(1) of the RHC. The weaknesses or demerits of a plaintiff's action or a party's pleadings cannot *ipso facto* be a ground for striking it out unless and until the specific requirements of O. 18 r. 19(1) of the RHC are fully met. (p 775 f-h)

[1st and 2nd defendants' application to strike out dismissed; costs in the cause.]

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd [1995] 4 CLJ 551 CA ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 HC ***(refd)***

Boey Oi Leng v. Trans Resources Corporation Sdn Bhd [2002] 1 CLJ 405 HC ***(refd)***

Edwards & Anor v. Halliwell & Ors [1950] 2 All ER 1064 ***(refd)***

Foss v. Harbottle [1843] 2 HARE 461 ***(refd)***

Hii Heng Tuong Alphonsus v. Lok Min Wah & Ors [1995] 4 CLJ 350 HC ***(refd)***

Huang Ee Hoe & Ors v. Tiong Thai King & Ors [1991] 1 CLJ 381; [1991] 2 CLJ (Rep) 745 HC ***(foll)***

Kantan Jaya Marine Services (Pg) Sdn Bhd v. RHB Bank Bhd [2001] 3 CLJ 738 HC ***(refd)***

Leong Peng Kheong & Anor v. Dawntree Properties Sdn Bhd [2002] 1 CLJ 602 HC ***(dist)***

Paidiah Genganaidu v. The Lower Perak Syndicate Sdn Bhd & Ors [1974] 1 MLJ 220 ***(refd)***

Pegasus Engineers Sdn Bhd v. Sambu (M) Sdn Bhd [1998] 3 CLJ 677 HC ***(refd)***

Prudential Assurance Co Ltd v. Newman Industries Ltd & Ors (No 2) [1982] 1 All ER 354 ***(refd)***

Roslan Abdullah v. New Zealand Insurance Co Ltd [1981] 2 MLJ 324 FC ***(refd)***

Tan Guan Eng & Anor v. Ng Kweng Hee & Ors [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74 HC ***(refd)***

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [2001] 3 CLJ 743 HC ***(dist)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d)

For the plaintiff - T Naraendran; M/s Naraendran & Suria
For the 1st & 2nd defendants - Rizal Dato' Jawhar; M/s Lee Hishamuddin

Reported by Gan Peng Chiang

JUDGMENT

Low Hop Bing J:

Application

Enclosure (48) is the first and second defendants' application under O. 18 r. 19(1)(b), (c) or (d) of the Rules of the High Court 1980 to strike out the plaintiff's writ and statement of claim, or alternatively part thereof, ie, para. 24(a), (b), (c), (d), (e) and (g).

Procedural Objection

At the outset, En. T. Naraedran, learned counsel for the plaintiff, relied on *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [2001] 3 CLJ 743 in raising a procedural objection that the instant application based on O. 18 r. 19(1)(b), (c) or (d) has taken the plaintiff by surprise as the use of these limbs in O. 18 r. 19(1) is not acceptable because in meeting with the application, the plaintiff has to respond to all the limbs.

In response, En. Rizal Dato Jawhar, learned counsel for the first and second defendants, contended that the first and second defendants have correctly applied O. 18 r. 19(1)(b), (c) or (d) disjunctively as the word used herein is "or".

For the purpose of putting the entire provisions of O. 18 r. 19(1) in proper perspective, it is necessary for me to reproduce these provisions in extenso as follows:

> (1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

Since limb (a) above has not been relied upon by the first and second defendants, I will only refer to the other three limbs in my judgment.

In my view, the use of the word "or" by the first and second defendants in respect of (b), (c) or (d) in O. 18 r. 19(1) indicates simply and more than clearly that the three limbs are applied disjunctively. This application is therefore a far cry from *Thiruchelvasegaram, supra*, in which the application under O. 18 r. 19(1) had employed the words "and/or" throughout in relation to the three limbs *viz* (b), (c) "and/or" (d), which had naturally led Abdul Malik Ishak, J to hold that such cumulative use was unacceptable, since the limbs under O. 18 r. 19(1) are disjunctive. In the different circumstances prevailing before me, the plaintiff's reliance on *Thiruchelvasegaram, supra*, is without merits.

In *Leong Peng Kheong & Anor v. Dawntree Properties Sdn Bhd* [2002] 1 CLJ 602, an application was made under O. 18 r. 19(1)(b), (c) and (d), in which case it was similarly held by the learned registrar and Azmel, J as being cumulative and therefore in non-compliance with the disjunctive requirement of O. 18 r. 19(1). Again, as in *Thiruchelvasegaram, supra, Leong Peng Kheong, supra*, offers no assistance whatsoever to the plaintiff's contention.

In my view, it is essential for an application under O. 18 r. 19(1) to be drafted in such a manner as to satisfy the disjunctive provisions therein, by avoiding the use of the cumulative word "and" and by merely using the critically important disjunctive word "or": *Pegasus Engineers Sdn Bhd v. Sambu (M) Sdn Bhd* [1998] 3 CLJ 677 CA.

The application herein by using the word "or" has undoubtedly complied with by this disjunctive requirement. Therefore I hold that the procedural objection raised for the plaintiff cannot be sustained and is hereby overruled.

Merits Of Application

Plaintiff's Locus Standi

In support of the application, it was contended for the first and second defendants that the plaintiff lacks the capacity or *locus standi* to bring this action against the first and second defendants.

On the other hand, it was submitted for the plaintiff that this action which was commenced by way of an originating summons had on 21 January 2002 been amended to include the plaintiff's representative capacity and the originating summons was subsequently converted on 28 February 2002 to a writ which is based on a derivative action by the plaintiff as a minority shareholder in the interest and for the benefit of the company which is the third defendant.

After a careful consideration of the aforesaid submissions, I am of the view that the immediate issue to be addressed is whether the plaintiff's action is defeated by the general rule in *Foss v. Harbottle* [1843] 2 HARE 461, ('the rule"). If so defeated, this application would succeed. On the other hand, if the plaintiff's action comes within one of the exceptions to the rule, then the plaintiff is at liberty to commence a derivative action, in which case this application would be doomed to failure.

The rule and the exceptions thereto are the pet topics of candidates who opt for company law as a subject in their law examination as the questions set therein would invariably include these topics as an indispensable part and parcel of the paper. Be that is it may, it is necessary, useful and instructive to familarise ourselves with the rule albeit elementary, as stated by Jenkins, LJ in *Edwards & Another v. Halliwell & Others* [1950] 2 All ER 1064, 1066 and applied, *inter alia*, by the Federal Court in *Paidiah Genganaidu v. The Lower Perak Syndicate Sdn. Bhd. & Ors.* [1974] 1 MLJ 220 H-I right as follows:

> The rule in *Foss v. Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*.

As alluded to above, there are however situations which constitute exceptions to the rule, thereby enabling a plaintiff to initiate a derivative action. These exceptions may be categorised as follows:

(a) *ultra vires* acts;

(b) fraud on the minority;

(c) special majority;

(d) personal rights; and

(e) where justice of the case requires.

(See *Tan Guan Eng & Anor v. Ng Kweng Hee & Ors* [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74 and the cases referred to therein by Edgar Joseph Jr. J (later FCJ)).

It is common ground that the plaintiff herein is proceeding with this action as a derivative action which is an action in a court of equity. The practice in our courts in this respect has been to follow that applied in *Prudential Assurance Co Ltd v. Newman Industries Ltd & Ors (No 2)* [1982] 1 All ER 354. In that respect, Chong Siew Fai, J (later CJ Sabah & Sarawak) in *Huang Ee Hoe & Ors v. Tiong Thai King & Ors* [1991] 1 CLJ 381; [1991] 2 CLJ (Rep) 745 in a well-considered judgment held, *inter alia*, as follows:

> (2) In a derivative action, before such an action is allowed to proceed, the defendants are entitled to ask for determination as a preliminary issue whether the plaintiffs have established a *prima facie* case (i) that the action falls within the proper boundaries of the exception to the rule in *Foss v. Harbottle*, and (ii) that the company is entitled to the relief claimed.
>
> (3) What is required to be established is a *prima facie* case so as to avoid unjustifiably subjecting the company to a full trial in order to enable the court to determine whether the plaintiffs were entitled in law to make the company undergo the entire action. Trial of the preliminary issues is to this end.

In order to determine whether the plaintiff herein is allowed to proceed with this derivative action, it is necessary for me to state that in initiating this derivative action, he is relying on his 40% shareholding in the third defendant and his appointment as a director and executive deputy chairman in the third defendant. In addition, he also alleges numerous wrongful acts committed by the first defendant as a majority shareholder amounting to a fraud or lack of probity and beyond the powers of the company ie, the third defendant. Several other allegedly wrongful acts were enumerated eg, the changing of the company directors and secretary twice without complying with proper procedure and done behind the plaintiff's back and obtaining the company secretary's letter of resignation by force or duress. In addition to the dispute on the plaintiff's shareholding in the third defendant, the plaintiff also referred to the first and second defendants' alleged breach of shareholding agreement dated 20 October 1999 entered into between the plaintiff and the first defendant. However for the purposes of this judgment

I do not consider it necessary to elaborate thereon, but merely to state that these allegations of fact are adequate to bring this action within the boundary of the exceptions *viz ultra vires* acts and fraud on the minority, as these are exceptions (a) and (b) to the rule as categorised above.

The initiation or commencement of a derivative action by the plaintiff herein as a minority shareholder is not unusual so long as the plaintiff is able to satisfy the court that he comes within any of the aforesaid exceptions to the rule.

In particular reference to the exception based on "fraud on the minority", the Court of Appeal through the well-considered judgment of Gopal Sri Ram JCA in *Abdul Rahim bin Aki v. Krubong Industrial Park (Melaka) Sdn Bhd* [1995] 4 CLJ 551 in explaining the doctrine embodied in this term of art held that the plaintiff relying on this doctrine must show that:

(a) those wielding majority control has shown a lack of probity in managing the company (ie, the third defendant herein); or

(b) those wielding majority control abused the powers vested in them in the sense that they used or omitted to use their powers for an oblique or collateral motive or purpose and not for the purpose for which the power was entrusted to them either by the memorandum and articles of association, by statute or the general law. (See also *Alor Janggus Soon Seng Trading Sdn. Bhd. & 6 Ors. v. Sey Hoe Sdn. Bhd. & 2 Ors.* [1995] 1 CLJ 461 SC)

It is my specific finding that the plaintiff has satisfied the aforesaid requirements for the purposes of establishing his *locus standi* to initiate this derivative action.

Order 18 r. 19(1)(b)

In relying on O. 18 r. 19(1)(b), the first and second defendants are in effect arguing that the plaintiff's action is scandalous, frivolous or vexatious.

In *Boey Oi Leng (t/a Indah Reka Construction & Trading) v. Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405, in the context of O. 18 r. 19(1)(b) I have the occasion to decide on the meaning of the word "scandalous" as meaning wholly unnecessary or irrelevant.

The plaintiff herein has established that he is bringing this derivative action as a director and a 40% shareholder of the third defendant and so I am unable to hold that the plaintiff's action is scandalous in the sense of being wholly unnecessary or irrelevant.

Similarly, it cannot be said that the plaintiff's action is frivolous or vexatious in the sense of being obviously unsustainable eg, where the doctrine of *res judicata* applies, or where the wrong party is being sued, or the action is without merit or not justified: See *Boey Oi Leng, supra*. Indeed, without deciding on the strength of the plaintiff's action at this juncture, I am of the view that the plaintiff's action is neither scandalous, nor frivolous or vexatious.

Order 18 r. 19(1)(c)

I am also unable to uphold the submissions of the first and second defendants that the plaintiff's action would prejudice, embarrass or delay the fair trial of the action, as provided for under O. 18 r. 19(1)(c). The allegations of the plaintiff's claim had been clearly spelt out in properly pleaded paragraphs and the plaintiff has filed his application *vide* encl. (42) under O. 34 for pre-trial case management for the purposes of obtaining directions from the court including the full hearing of the action herein. Therefore the plaintiff's claim could not be said to prejudice, embarrass or delay the fair trial of this action.

Order 18 r. 19(1)(d)

There is also nothing in the submission of the first and second defendants to lead me to the conclusion that the plaintiff's action is an abuse of the process of the court under O. 18 r. 19(1)(d).

An abuse of the process of the court can arise under O. 18 r. 19(1)(d) when eg, the plaintiff's action is intended to embarrass the first and second defendants, which does not appear to be the case herein as the plaintiff has a legitimate right to initiate and pursue in the derivative action.

Striking Out Only In Plain And Obvious Cases

It has been stated ever so often by our courts that it is only in absolutely plain and obvious cases that a plaintiff's claim or action or a party's pleadings would be struck out under any of the limbs of O. 18 r. 19(1): See eg, *Roslan bin Abdullah v. New Zealand Insurance Co Ltd* [1981] 2 MLJ 324 FC.

The weakness or demerits of the plaintiff's action or a party's pleadings cannot *ipso facto* be a ground for striking out but it has to be proved, established or demonstrated that the specific requirements and terms contained in O. 18 r. 19(1)(b), (c) or (d) has been satisfied.

In the instant case, there are serious conflicts or controversies in the multifarious affidavits filed by the parties herein. I am neither bound nor prepared to resolve these conflicts or controversies at this premature affidavit stage, but would only resolve them by way of mature consideration of *viva voce* evidence adduced at a full hearing of the action herein: *Kantan Jaya Marine Services (Pg) Sdn Bhd v. RHB Bank Bhd* [2001] 3 CLJ 738; *Hii Heng Tuong Alphonsus v. Lok Min Wah & Ors* [1995] 4 CLJ 350 HC.

On the foregoing grounds, I hold that the application is without merits and is hereby dismissed.

Costs

As the plaintiff's procedural objection has been overruled and the first and second defendants' application dismissed, I am of the view that the question of costs as a matter of discretion should be resolved by an order which is fair and reasonable in the circumstances of this case. I hold that it is fair and reasonable that costs be in the cause, whereby I hereby order.